

APPLICANTS:
Barry and Giovanna Treherne

**REQUEST: A variance pursuant to
Section 267-24B(1) of the Harford County
Code to allow an existing 6 foot fence within the
front yard**

HEARING DATE: May 5, 2004

**BEFORE THE
ZONING HEARING EXAMINER
FOR HARFORD COUNTY
BOARD OF APPEALS
Case No. 5412**

ZONING HEARING EXAMINER'S DECISION

APPLICANTS: Barry and Giovanna Treherne

LOCATION: 100 Calder Court/Forest Lakes, Forest Hill
Tax Map: 40 / Grid: 2D / Parcel: 321 / Lot: 766
Third Election District

ZONING: R2 / Urban Residential

REQUEST: A variance pursuant to Section 267-24B(1) of the Harford County Code to allow an existing 6 foot fence within the front yard in a R2 District.

TESTIMONY AND EVIDENCE OF RECORD:

For the Applicants first testified Giovanna Treherne. Mrs. Treherne testified that she and her husband constructed a 6 foot fence in March of 2001. That fence is shown on Applicants' Exhibit 1, which is a plot plan of the Applicants' property showing all improvements and the location of the fence in red. The fence extended from the Applicants' house to the property line at Calder Court, along Calder Court, down the side property line, along the back and up to the side of the Applicants' property.

In September 2003, the fence was somewhat expanded by extending it by approximately 10 feet along the rear property line. The fence was extended as the Applicants were having a pool installed, and the pool contractor stated that he would have a difficult time reinstalling the fence into the concrete pool decking, so he suggested that the fence be expanded by about 10 feet in that location. The fence was accordingly slightly relocated and the pool was completed by August 2003.

The completed fence is a uniform height of 6 feet.

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Mrs. Treherne stated that her property was unusual because it has two front yards, and the front yard along Calder Court is exacerbated because of the curve along the road in that area. She stated there are no other properties in the neighborhood that have a similar configuration. She also stated the lot is not level. There is approximately a 2 to 2 ½ foot drop in the rear yard. She believes that if the fence were reduced in height in the rear yard, it would create a safety issue because children would be able to more easily jump the fence because of the sloping yard. The fence would, in effect, be easier to scale because of the grade change.

If the variance were not granted Mrs. Treherne believes that her practical difficulty would be the financial hardship imposed by having to move or reduce the size of the fence.

Mrs. Treherne indicated that none of her neighbors opposed the request. She identified a number of letters in the file from her neighbors, all expressing lack of opposition.

Mrs. Treherne was next cross-examined by Barbara Flanagan, the Property Manager of the Forest Lakes Homeowners Association. Ms. Flanagan asked if Mrs. Treherne had received various letters from the Property Manager, on behalf of the Homeowners Association, concerning the size of the fence. Mrs. Treherne indicated that she had received some but apparently not all of those letters.

Mrs. Treherne was next cross-examined by Robin Anderson, a homeowner in the Forest Lakes Subdivision who resides at 1986 Hillview Court, Forest Hill. Upon questioning, Mrs. Treherne indicated she understood that the Homeowners Association was governed by By-Laws. She was asked if she had filed for approval for the most recent change to the fence. Mrs. Treherne indicated she had not; it was the contractor's responsibility. Ms. Anderson indicated the approval of the Applicants' request would not be fair to other homeowners who also wanted fences approved which were not allowed by the By-Laws. Ms. Anderson indicated she was opposed. The 6 foot high fence violates the guidelines, and the Homeowners Association cannot grant exceptions. The Homeowners Association is strict about this. Ms. Anderson stated there are at least two other homes that have two front yards. She does not want the Treherne's application to be approved and accordingly create a precedent which would require approval for those other homeowners as well.

Ms. Anderson stated that there are no existing, similar homes that have permits for 6 foot high fences in their front yard setback. There are at least three other homes which are presently in violation.

Ms. Treherne was next cross-examined by Katherine Cohen, of 909 Charisma Court, Forest Hill, also located within the Forest Lakes Subdivision. Ms. Cohen asked if Mrs. Treherne believed the fence presented a sight problem for the neighbor. Mrs. Treherne indicated that she did not believe there was a sight problem. Mrs. Treherne also indicated that the neighbor, Mr. Mussleman, has submitted a letter to the file expressing his lack of opposition to the 6 foot high fence.

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Next testified Steven Nolan for the Applicant. Mr. Nolan is President of Campbell Nolan & Associates, an engineering firm.

Mr. Treherne is an employee of Campbell Nolan & Associates.

Mr. Nolan indicated in his opinion that the Treherne's lot is unique. The property has two front yard setbacks, with the setback along Calder Court having more of an impact than normal because of the curve in Calder Court. This effectively brings the setback much closer to the house than normal. Mr. Nolan stated that the resulting practical difficulty is that the fence would have to be removed if the variance were not granted. The fence surrounds the entire pool, and presents a safety issue.

Next testified Anthony McClune of the Harford County Department of Planning and Zoning. Mr. McClune expressed the Department's findings that the property is unique. It is on a cul-de-sac which is unusually short. The front yard setback actually sweeps into and behind the Applicants dwelling because of the curving front yard along Calder Court. The front yard setback goes almost to the other side of the house.

Mr. McClune pointed out that the file contains a letter dated March 27, 2001 from MRA Property Management, Inc., representing the Forest Lakes Homeowners Association. That letter was directed to Giovanna Treherne and indicated approval of the plans as submitted for a fence. The plans submitted and approved were for a 6 foot fence.

Mr. McClune explained that there was no concern about the fence to the rear of the property, or the addition to the fence constructed by the Treherne's in 2002. It is only that portion of the fence which is impacted by the front yard setback requirement that is in violation. That portion of the fence is to be, by Development Regulations, 4 feet high only. That portion of the fence outside of the front yard setback is in compliance at 6'. The Applicants are required to maintain a 30 foot setback off Calder Court.

Mr. McClune indicated the vehicles coming in and out of Lot 765, which is the Mussleman property, should have no sight distance problems exiting or entering that property.

In opposition next testified John Mettee, who resides at 1994 Gulfstream Court, Forest Hill, also in the Forest Lakes Subdivision. Mr. Mettee indicated that he was the past President of the Forest Lakes Subdivision Homeowners Association. Mr. Mettee explained that the Homeowners Association saw this case as a problem because another homeowner had put up the same type of fence. The other homeowner was in violation of the By-Laws, and that homeowner used the Treherne property as an example as to why his fence should remain at 6 feet. Accordingly, the Homeowners Association is concerned the Treherne's not be given the permit for something which would be in violation of the Homeowners Association Regulations.

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Mr. Mettee believes that there should be no exceptions granted, because any exception would cause a precedent which the Homeowners Association wishes to avoid. The Homeowners Association does not wish to have 6 foot high fences in the front yard setbacks. He believes that a 4 foot fence would be acceptable. He does not oppose a 4 foot fence.

Mr. Mettee also explained that the Homeowners Association did not originally oppose a 6 foot high fence, provided it was in compliance with Harford County Zoning Regulations. It is only when the Homeowners Association realized that the 6 foot high fence was not in compliance with the Harford County Development Regulations did the Homeowners Association oppose the use.

Mr. Mettee was questioned by Mrs. Treherne. He explained that when the 2001 letter was sent to Mr. and Mrs. Treherne he, Mr. Mattee, did not realize a 6 foot high fence was not allowed by Harford County Development Regulations. The Homeowners Association only began to investigate when a second homeowner also requested approval. The Homeowners Association expects the individual homeowner to check County regulations and to request a proper permit from Harford County. The Homeowners Association approval is conditioned upon the homeowners obtaining Harford County permits and approval, if necessary.

Katherine Cohen then testified. Ms. Cohen stated that in her opinion approval must be in accordance with County regulations. The fence must be in compliance with those regulations, and exceptions should not be granted. Ms. Cohen is also a member of the Board of the Homeowners Association, and believes that the fence in the front yard setback should be 4 feet only. She stated that other homeowners with similar homes are also concerned about this decision. She worries that an approval would set a bad precedent. It would be difficult for the Homeowners Association to deny other homes 6 foot high fences if this approval is granted.

Next testified Robin Anderson. Ms. Anderson indicated that the Homeowners Association tries to be fair, but it is worried about precedents. There are several corner lots in the development, several on cul-de-sacs, and she believes that 6 foot high fences in the front yard setback would be a problem and a bad precedent. Ms. Anderson stated that the failure of homeowners to file for permits is a problem. Several people are in violation at the present time.

Mr. Treherne, in response, indicated there was no safety problem, and no one has been hurt on his court. No neighbors are opposed.

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APPLICABLE LAW:

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

“Variances.

- A. Except as provided in Section 267-41.1.H., variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*
 - (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.*
 - (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*
- B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.*
- C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.”*

The Applicants are requesting a variance to § 267-24B which states:

- “(1) Front yards. For single-family detached units, walls and fences shall not exceed four feet in height above ground elevation. Where fences and walls are an integral part of the unit design and are applied in a consistent and coordinated pattern throughout the project, fences and walls may be constructed to a maximum of six feet above ground level. For continuing care retirement communities, consistent and coordinated fencing or walls may be constructed to a maximum of eight feet above ground elevation provided strategically located gates are provided for emergency access.”*

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FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicants own what appears to be an usually shaped lot. It has two front setbacks with the one along Calder Court having more of an impact than normal because of the curve of Calder Court, which in essence throws the front yard setback well into what would normally be the side yard of the Applicants' property. Examination of Attachment 2, marked as Applicants' Exhibit 1, indicates that one entire side of the front yard of the property on the Calder Court side is enclosed by the fence which extends along the side of the house and into the rear. The amount fenced is well in excess of that necessary to enclose the pool.

In March of the year 2001, the Applicants apparently requested permission from the Homeowners Association to erect a 6 foot high fence. The Homeowners Association approved that request with the following caution: **"Please note that all County permits, approvals, and setbacks are the responsibility of the homeowners."** Testimony of the Homeowners Association representatives was that it expected homeowners to comply with those regulations. The Homeowners Association itself did not check to see if County Regulations were applicable or involved when they gave their initial approval.

Despite this warning, the Applicants then apparently took no action to secure a County permit and installed the fence.

In 2002, the pool was constructed and the fence was expanded somewhat in the rear yard of the Applicant's property. There is no issue concerning the fence in the rear yard of the property. The question before the Board is whether a variance should be granted to allow a 6 foot high fence, instead of a 4 foot high fence, within the unusually shaped front yard of the Applicants' property.

Harford County requires outdoor swimming pools to be provided with a 48 inch barrier above ground (See Harford County Code, Article II, Appendix G to International Residential Code, Section AG105.2.1.)

Both the Applicants and, Mr. Nolan on their behalf, indicated that the lot was unique. The resulting difficulty would be the hardship they would suffer if required to remove the fence. Both the Applicants and Mr. Nolan also expressed some resulting safety concerns if the variance were not granted. Mr. McClune and the Harford County Department of Planning and Zoning indicated the lot was unique because of the two front setbacks, and the curve in Calder Court.

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Unfortunately, none of these unusual features of the property contribute in any way to a practical difficulty which rises to a level sufficient to justify the granting of the variance. The difficulty suffered by the Applicants must somehow be related to the uniqueness of the property. The Applicants cannot make that connection. Their difficulty may be a personal hardship; it, however, is not related to the property:

“ . . . the difficulties or hardship must be unique to justify a variance; they must be peculiar to the application of the Zoning Restrictions to particular property and not general in character . . . It is not uniqueness of the plight of the owner, but uniqueness of the land causing the plight, which is the criterion . . .” See Cromwell v. Ward, 102 Md. 691.

If the variance were denied the Applicants would be faced with a choice: they must either move the fence back 30 feet from Calder Court, or they must eliminate the top 2 feet of the fence which is in the front yard setback. Either of these actions, if required to be taken, would be a financial cost to the Applicants, but would not cause foreseeable safety problems to the users of the pool. The pool would remain fenced, and the fence would comply with Harford County barrier requirements. Indeed, the entire pool would be surrounded by a 6 foot fence except that portion on the Calder Court side, which would be a 4 foot high fence. Mere financial hardship cannot be a basis for the granting of a variance.

Furthermore, despite the lack of opposition by the neighbor at Lot 765, it would appear that a potential safety problem does exist. That neighbor exiting his driveway at Lot 765 would have directly to the side of his driveway a 6 foot high fence. This fence would clearly tend to impact his view from Calder Court. This finding is based upon examination of photos in the file marked as Attachment 6.

The practical difficulty suffered by the Applicants must result from the unusual feature of the property. The difficulty which would be experienced by the Applicants would be the expense they would incur by having to relocate or lower a portion of the fence. That difficulty is not related to any unusual feature of the property. Indeed, the Applicants would have known of such a necessity, and would not have even suffered this difficulty, if they had properly applied for a permit from Harford County in the first instance, and not undertaken construction without such a permit. The variance provision cannot be used to alleviate a self-created hardship such as this.

CONCLUSION:

For the above reasons the requested variance is denied.

Date: May 21, 2004

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner